(12)

No. 91-1947

Supreme Court, U.S.
FILED
NOV 29 1991
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE YEE, et al.,
Petitioners,

vs.

CITY OF ESCONDIDO, a municipal corporation,
Respondent.

On Certiorari to the
California Court of Appeal
Fourth Appellate District, Division One

BRIEF OF MANUFACTURED HOUSING EDUCATIONAL TRUSTS OF LOS ANGELES COUNTY AND ORANGE COUNTY, CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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This brief is submitted with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The Manufactured Housing Educational Trusts of Los Angeles County and Orange County, California are non-profit trade associations whose individual and organizational members include owners and operators of more

than 500 mobilehome parks in Southern California. Local regulations and exactions are matters of great interest to members who develop, operate and serve mobilehome communities that house tens of thousands of Southern California residents, including many senior citizens and young families.

Amici believe that ordinances like Escondido's, which appropriate possessory interests in property and enrich current residents at the expense of their successors, as well as investors in mobilehome communities, deter development of affordable housing, increase its cost and limit the availability of affordable housing.

Amici believe that their experience and perspective can assist the Court in understanding the economic effects and legal consequences of the Escondido Ordinance, which resembles many others either presently in effect or contemplated in California and other states.

Amici respectfully request that the Court reverse the decision of the California Court of Appeal and instruct the lower court to remand the consolidated cases for trial.

STATEMENT OF THE CASE

"Mobilehome" is a misnomer. Today's mobilehomes are not trailers. They are manufactured homes, built in sections, towed into place on a prepared space or "pad," assembled, connected to utilities and then fitted with awnings, porches and the like. Their size and comforts compare favorably with postwar tract homes. Mobilehome communities have long appealed to senior citizens and, as prices for conventional homes have risen, mobilehomes have become increasingly popular "starter" homes for young families.

Typically, mobilehome residents own their homes and rent the space from the owner of the mobilehome park who provides private streets, recreational facilities, common areas and amenities.

California regulates mobilehome tenancies through a Mobilehome Residency Law. Cal. Civ. Code § 798 *et seq.* (West 1991). Owners may not terminate tenancies without cause, require removal of mobilehomes when tenancies end, or disapprove incoming residents, so long as they are creditworthy, and likely to abide by park rules. Cal. Civ. Code §§ 798.55, 798.73, 798.74 (West 1991). As a consequence, mobilehomes are usually sold in place when a resident wants to move. Residents sell their homes to new residents, subject only to the owner's approval of credit and references.

In recent years, persistent inflation has brought rent control to many California communities. Escondido's ordinance (the "Escondido Ordinance"), enacted by the voters in 1988, reduced mobilehome space rents to 1986 levels. Property owners may apply to the City Council, sitting as a Mobilehome Park Rental Review Board, for rent increases in order to pay for capital improvements and certain cost increases. All other increases are misdemeanors.

The Escondido Ordinance, operating in conjunction with the Mobilehome Residency Law, assures residents permanent tenure and bargain rent, so long as they pay the rent and observe park rules. Incoming residents enjoy the same rights, so mobilehomes change hands at huge premiums — often tens of thousands of dollars more than comparable homes in dealer inventories or unregulated mobilehome parks. *Amici* believe that these premiums represent the value of a statutory leasehold — a permanent, transferable, possessory interest in the owner's

property — created by operation of law and given to the tenants without just compensation, in violation of the Fifth Amendment.

Three panels of two Circuit Courts of Appeals have agreed. *Hall v. Santa Barbara,* 833 F.2d 1270 (9th Cir. 1987), *cert. denied,* 485 U.S. 940 (1988); *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir. 1990); *Azul Pacifico Inc. v. City of Los Angeles,* ___ F.2d ___, Nos. 90-55853, 90-56066, slip op. 15213 (9th Cir. Nov. 1, 1991). On similar grounds, New York's highest court overturned a New York City statute that compelled owners of one-room apartments to rehabilitate and rent their properties. *Seawall Assocs. v. City of New York,* 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

California courts disregarded these authorities and dismissed Petitioners' complaints. As in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), and *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), this Court's decision is needed to assure that California law conforms to the Fifth Amendment.[1]

SUMMARY OF ARGUMENT

Under the Fifth Amendment, private property cannot be taken without just compensation. Constitutional protection extends to all forms of property: real, personal, tangible and intangible. For constitutional purposes, "property" means rights to possess, use and dispose of land, buildings or other things, rather than the things

[1]In *Nollan,* this Court noted that its "conclusion . . . [was] consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 483 U.S. at 839.

themselves. This Court has long recognized that such varied interests as air rights, leaseholds, liens, easements, rights of inheritance and other partial, contingent or intangible interests in property cannot be taken without just compensation. Government action takes private property if it effects a physical occupation or invasion; does not substantially advance a legitimate governmental purpose; or if the character, economic impact, and interference with distinct, investment-backed expectations are so severe that the burden should properly fall upon the public, rather than a few persons.

Often, "taking" claims are classified as "physical" or "regulatory." Whatever label applies, the labels are variations upon the same theme, for constitutional analysis requires an examination of the effects upon constitutionally-protected rights to possess, use and dispose of property. "Physical" takings include a wide variety of interference with constitutionally-protected rights, including seizures and invasions of property, appropriations of subsidiary rights, imposition of easements, destruction of particular expectancies or rights, and other measures that dispossess owners or impair their rights.

Under the Escondido Ordinance, as it is alleged to operate, valuable rights in the realty are transferred to mobilehome park residents, who may occupy the owner's land permanently at reduced rent, and sell that right to others. In effect, residents receive a bargain leasehold, created by the Ordinance, as it operates in conjunction with California's Mobilehome Residency Law. Cal. Civ. Code §§ 798 *et seq.* (West 1991). Residents sell these property rights to their successors, along with their used mobilehomes, when they decide to move. New residents are willing to pay large premiums in order to enjoy the rights transferred by the Ordinance. As a consequence,

used mobilehomes change hands at prices that far exceed the value of the used mobilehome coach, because the nominal price includes rights in the underlying land appropriated by the Ordinance.

In *Hall* and *Pinewood*, the Ninth and Third Circuits, respectively, held that allegations like the Yees' state claims for relief. In *Azul Pacifico*, the Ninth Circuit affirmed a District Court judgment that an ordinance essentially similar to Escondido's had taken interests in an owner's property. All three decisions correctly held that the takings in question were "physical" takings. By granting permanent, possessory interests to residents and extinguishing the vital right to exclude others, the Escondido Ordinance likewise effects a physical taking.

The Court need not find a "physical" taking to reverse the judgment below since the Escondido Ordinance does not substantially advance any legitimate state interest and lacks the nexus between means and ends required by *Nollan*. The Escondido Ordinance confers valuable rights upon residents in place when Escondido voters approved the initiative, but it confers little or no benefit on future residents compelled to pay large premiums for used mobilehomes (or, more precisely, for the rights taken by the Ordinance and given to their predecessors). It confers no benefits whatever upon the owners of the property. The owners bear the economic impact, and their expectations are frustrated by a redistribution of interests in the property.

Thus, the Escondido Ordinance, as it is alleged to operate, takes Petitioners' property under any standard that might be applied. However their claims may be described, they have sufficiently alleged that interests in their property have been taken by operation of the Escondido Ordinance.

ARGUMENT

I. The Fifth Amendment Protects All Property, Including Leaseholds Created By Operation of Law.

Under the Constitution, private property may not be taken for public use without just compensation. This Court has held that the Constitution protects all property, real and personal, tangible and intangible.

> The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.*, 323 U.S. 373 (1945). It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* at 377-78.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 n.6 (1980). The Fifth Amendment has been invoked to protect such varied interests as leaseholds, *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); rights of inheritance, *Hodel v. Irving*, 481 U.S. 704 (1987); trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); materialmen's liens, *Armstrong v. United States*, 364 U.S. 40 (1960); mortgage liens, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); and valid contracts, *Lynch v. United States*, 292 U.S. 571 (1934).

The cases are as varied as the range of interests suggests. For that reason, this Court has explained:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid depends largely "upon the particular circumstances [in that] case."
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (citations omitted).

Takings are more readily found when interference with property can be characterized as a physical invasion, but government interference with property interests may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose or if there is an unduly harsh impact upon the owner's use of the property. *Id.* at 124, 127. In appropriate cases, frustration of investment-backed expectations or destruction of particular rights in property have also been ruled "takings" of property. *Id.*

Property consists not merely of land, buildings or other tangible things, but of a bundle of rights to possess, use and dispose of those things. Constitutional analysis therefore proceeds from the factors identified in *Penn Central* and other precedents, as they affect the constitutionally-protected rights that inhere in property. Courts and commentators tend to classify taking claims as "physical" or "regulatory," but the range of precedents illustrates that these labels are convenient points of reference on a continuum, rather than discrete or mutually exclusive categories. Compensable takings cover a wide spectrum of government action: seizure of property for government use; dispossession for others' use; physical invasion or interference; appropriation of subsidiary interests in property; destruction of particular expectancies or rights; and appropriation of encumbrances and other rights created by contract or operation of law.[2] The "regulatory" and "physical" labels are variations upon the same theme: interference, deprivation or destruction of constitutionally protected rights to posess, use or dispose of property.

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[2] *See, e.g., Hodel*, 481 U.S. 704 (1987) (escheat to tribes of fractional interests in Indian lands that would otherwise pass by inheritance); *Armstrong*, 364 U.S. 40, (destruction of materialmen's liens by sovereign immunity); *United States v. Causby*, 328 U.S. 256 (1946) (overflight); *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922) (gunfire over property); *Radford*, 295 U.S. 555 (1935) (mortgage lien taken by farm debt relief law); *United States v. Cress*, 243 U.S. 316 (1917) (repeated flooding).

Some takings are clearly "physical," others "regulatory"; and some have aspects of both. In *Nollan,* 483 U.S. 825, for example, this Court held that a "permanent physical occupation" had accurred when the California Coastal Commission conditioned issuance of a permit to build a home upon the owners' willingness to grant an easement across their private beach. In *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) this Court found that imposition of a navigational servitude upon a private waterway extinguished the right to exclude others, which the Court characterized as an expectancy so fundamental that it could be taken without compensation and one that would cause actual physical invasion of Kaiser Aetna's private marina.

Other precedents involve deprivations of contingent rights that might be reduced to possession. In *Radford,* 295 U.S. 555, for example, the Court struck down a farm debt relief law that effectively deprived lenders of mortgage liens. Many years later, the Court relied upon *Radford* when it ruled that transfer of incomplete vessels to the United States had taken materialmen's liens in violation of the Fifth Amendment. *Armstrong*, 364 U.S. at 44.

According to the allegations in the complaints, the Escondido Ordinance grants the 1988 residents transferable possessory interests in the owner's property. Residents in place when the voters enacted the Ordinance may sell these rights and interests to the buyers of their choice, along with their mobilehome coaches, when they decide to move. An owner's rights of possession, use and disposition ordinarily include the rights to transfer lesser interests in the property, including leaseholds, easements and the like. In Escondido, many of these rights have passed to the residents by operation of the Escondido Ordinance, without compensation. Because ordinances

like Escondido's, operating in conjunction with state residency laws, impair rights of possession, use and disposition, including the important right to exclude others, three federal courts of appeals have held that appropriation of an owner's interest by operation of law is a physical taking. *Hall,* 833 F.2d 1270; *Pinewood,* 898 F.2d 347; *Azul Pacifico,* slip op. 15213.

The effect of the Escondido Ordinance on owners of mobilehome parks may be described in various ways: as physical occupation or invasion, extinguishment of attributes of ownership, redistribution of the bundle of rights between owner and tenant, appropriation of the right to collect rent, or a regulation that advances no substantial public purpose, since its principal effect is to enrich the 1988 residents at their successors' expense. Whatever the label, and however the effects are described, the interference with constitutionally protected rights of possession, use and disposition is clear.

Under the principles laid down by this Court, the effects of this Ordinance constitute a "physical" taking. The California court below suggested that *Hall* and its progeny are aberrations, rejecting any suggestion that the Escondido Ordinance effected a "physical" taking. *Amici* will demonstrate that *Hall, Pinewood* and *Azul Pacifico* represent logical applications of this Court's decisions. The Yees, whose claims are indistinguishable from those sustained in *Hall* and *Pinewood* and proved in *Azul Pacifico*, have alleged physical takings of their property. But whatever label applies, no matter how the interference with property rights may be described, constitutionally protected property rights have been taken without compensation.

When buyers pay tens of thousands of dollars in resale premiums for used mobilehome coaches — as Petitioners

alleged, and as found in *Azul Pacifico* — they must believe they are buying something. Mobilehomes are personal property, *Hall,* 833 F.2d at 1273, so any interests in the realty that residents obtain by operation of law have to come from the landowner. Under *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229 (1984), Escondido may have the power to redistribute interests in realty, but if it wants to give 1988 residents interests in Petitioners' property, "it must pay for [them]." *Nollan,* 483 U.S. at 842.

II. The Escondido Ordinance Effects A Physical Taking.

In *Hall,* the Ninth Circuit, relying on this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), "held that the challenged ordinance could be found to transfer a possessory interest in land to the mobilehome tenants, and thus constituted a physical occupation." *Azul Pacifico,* slip op. 15213, 15221. In *Pinewood,* the Third Circuit reached the same conclusion:

> [T]he physical invasion of their properties and the uncompensated creation of interests in them worked by the [ordinance] in connection with the state [residency] law is far more pronounced than that in *Loretto.* Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobilehome, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to

> the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

898 F.2d at 353.

Hall, Pinewood and *Azul Pacifico* are not aberrations but straightforward applications of *Loretto* and other precedents. Analysis must look past the "vulgar and untechnical sense of the physical thing" to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors,* 323 U.S. at 377-78. The lower court's reasoning emphasizes the label and overlooks decisions of this Court which establish that "physical" takings encompass a variety of measures that indirectly dispossess owners or deprive them of their protected rights of possession, use and disposition. Deprivation of rights, rather than physical possession, is the essential quality. *See YMCA v. United States,* 395 U.S. 85, 92-93 (1969). Authorized occupation by third parties takes an owner's property as effectively as occupation by the government. *Loretto,* 458 U.S. at 432-33, n.9.

Government need not occupy property or even dispossess the owner to effect a "physical" taking. For example, in *Kaiser Aetna,* the Federal Government had asserted a navigational servitude over a private waterway. This Court ruled that "the Government's attempt to create a public right of access . . . goes so far beyond ordinary regulation . . . as to amount to a taking." 444 U.S. at 178. The Court explained that the Fifth Amendment protects "a number of expectancies embodied in the concept of 'property' — expectancies that, if sufficiently important, the Government must condemn and pay for." *Id.* at 179. The Court held that the " 'right to exclude,' so universally

held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 179-80.

In *Loretto,* the Court held that "permanent physical occupation authorized by government is a taking," even though the physical occupation — installation of rooftop television cables and boxes — was insignificant. 458 U.S. at 426.

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property. . . . Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value. . . .

Id. at 435-36 (emphasis by the Court) (citations omitted). As in *Kaiser Aetna,* this Court's conclusion flowed from the legal consequences, rather than the occupation or intrusion — unobtrusive cables and boxes in *Loretto,* passage through a private waterway in *Kaiser Aetna.*

Occasional or intermittent intrusion may also take property. In *Nollan,* the Court ruled that "a 'permanent physical occupation' has occurred . . . where individuals are given a . . . continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises." 483 U.S. at 832. Citing *Kaiser Aetna* and *Loretto,* this Court stressed the importance of the right to exclude others, " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " 483 U.S. at 831.

Taken together, these precedents make clear that "physical" takings encompass much more than seizure of property, occupation of land, destruction of land by flooding or other total dispossession of the owner. In each case, this Court has examined the facts and the effects of government action upon rights of possession, use and disposition. Where those rights, or such related rights as the right to exclude, have been substantially infringed, a court may find a "physical" taking, even though the owner retains substantial economic and practical use of his property as a whole, as in *Kaiser Aetna, Loretto* and *Nollan.*

Chief Justice Rehnquist applied these principles to rental housing in *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875 (1983) (Rehnquist, J., dissenting), and implicitly recognized that "physical" is not an entirely apt label. Local rent controls in Cambridge, Massachusetts, coupled with state law, effectively precluded evictions, demolition and redevelopment of the property. This "deprive[d] appellant of the use of its property in a manner closely analogous to a permanent physical invasion, like that involved in [*Loretto*]." *Id.* at 877.

In *Seawall Assocs. v. City of New York,* 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), New York's highest court struck down an ordinance that compelled owners of one-room apartments to rehabilitate and rent their properties, and forbade conversion and demolition. Relying upon *Nollan, Loretto* and *Kaiser Aetna,* the New York court analyzed the effects of the ordinance upon the owner's rights of possession, use and disposition and found that:

> Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.

74 N.Y.2d at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546.

In *Hall,* the Ninth Circuit applied similar reasoning to allegations essentially identical to these Petitioners':

> When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto, Kaiser Aetna* and their precursors. Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto.*

> The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause. . . . [T]he ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely. Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants . . . . If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer . . . .
>
> Moreover, because of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobilehome. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use . . . . If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others.

833 F.2d at 1276-77.

The Escondido Ordinance, operating in conjunction with California's Mobilehome Residency Law, dispossesses owners, extinguishes the right to exclude others, and grants residents a statutory leasehold, with bargain rent, that they can sell along with their mobilehome coaches. Where a possessory interest in realty has been taken by operation of law, the Court should conclude that a "physical" taking has occurred. By dismissing Petitioners on the pleadings, the California courts failed to undertake the ad hoc, factual inquiry that this Court's precedents require.

III. The Escondido Ordinance Effects a Taking Under Traditional Takings Analysis.

The Court need not find that Petitioners have alleged a physical taking in order to reverse the judgment below. The Escondido Ordinance offends constitutional principles laid down by this Court since Justice Holmes' seminal opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). The property interests appropriated by the Escondido Ordinance enjoy Fifth Amendment protection, whether or not its effects are characterized as a "physical" taking.

Permanent physical occupations or invasions are takings *per se* because they impair or destroy rights of possession, use and disposition. Other government action with similar legal and practical effects must also be compensated, whether or not the particular means involve "physical" dispossession of the owner, or "physical" interference with his use. In *Pennsylvania Coal,* Justice Holmes observed that:

> [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. 415-16. Regulations of land use may effect takings if they:

> [do] not substantially advance legitimate state interests or [deny] an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.

Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (citations omitted). As this Court noted in *Penn Central* and later decisions, "these essentially ad hoc, factual inquiries" involve such factors as economic impact, interference with investment-backed expectations, and the character of the governmental action. *Penn Central,* 438 U.S. at 124. Actions that extinguish "fundamental attribute[s] of ownership," such as the right to exclude others, may also constitute takings. *Agins,* 444 U.S. at 262 (citing *Kaiser Aetna,* 444 U.S. at 179-80). Under these principles, the Court has invalidated government action that imposes easements, impairs creditors' liens, inheritance rights and a variety of other interests in property.[3]

Those principles apply with equal force to the Escondido Ordinance, which deprives owners of rights of possession, disposition and use, extinguishes the right to exclude others, and grants permanent leasehold interests to residents. If Escondido voters wish to give interests in Petitioners' property to the 1988 tenants, just compensation is due.

A. The Escondido Ordinance does not substantially advance legitimate state interests.

The Escondido Ordinance allows no rent increase when mobilehomes are sold. Rent increases are misdemeanors, unless authorized by the City Council (sitting as the Mobilehome Park Rental Review Board) after formal

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[3] *See supra* note 2.

proceedings. Since the Ordinance passed by the voters contains no findings or recitals, the voters' intent is uncertain. Justifications advanced by Respondent's counsel include inequities caused by scarcity and protection of the mobilehome owners' investment. Respondent's Brief in Opposition at 27. Under *Nollan,* "evident constitutional propriety disappears" if regulatory exactions "utterly fail[] to further the end advanced as the justification." 483 U.S. at 837. Nollan requires an adequate nexus between ends and means. *Id.* at 834 n.3, 837, 841. The Escondido Ordinance fails this test.

The Escondido Ordinance does nothing about scarcity. On the contrary, rent controls like Escondido's that forbid rent adjustments when mobilehome coaches are sold in place may discourage new construction.[4] The Ordinance does nothing to alleviate the effects of scarcity upon new residents, who must pay large premiums — nominally for the used mobilehome, but actually for the mobilehome and statutory leasehold. To save rent dollars, the buyer must take a larger mortgage; but overall housing costs remain unchanged. For these reasons, the Ninth Circuit in *Azul Pacifico* was "unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose." *Azul Pacifico,* slip op. 15213, 15228.

The Escondido Ordinance cannot even achieve its nominal purpose of controlling rents. New residents compelled to pay large premiums for used mobilehome coaches effectively pay far more than the purportedly "fair" controlled rent. For residents in place at the time of the June

[4]California recently amended the Mobilehome Residency Law to exempt newly constructed mobilehome spaces from local rent controls. Cal. Civ. Code § 798.7 (West 1991).

1988 vote, controlled rents are effectively reduced by premiums collected upon resale of their mobilehome coaches when they move away.

From the record in *Azul Pacifico,* the Ninth Circuit found a potential justification in the desire to protect owners against "unscrupulous landlords," lest exorbitant rents depress home prices to distress levels. *Id.* There is no such record here, or any indication of legislative purpose, apart from counsel's assertions. To demand exorbitant rents would be contrary to the owners' own interests, since such demands would deter listings and sales, and would thus preclude *any* rent increase that might be permitted upon sale of a mobilehome in place. The risk of isolated abuse does not justify indiscriminate, uncompensated appropriations of the owners' property. Government does not generally police unfair business practices by appropriating property interests from all participants in a particular business. The disputed provisions of the Escondido Ordinance do not substantially advance any legitimate interests.

With similar reasoning, the New York court in *Seawall* found that compulsory rehabilitation and rental of efficiency apartments would do little to resolve homelessness, since there was no assurance that the apartments would be rented to homeless or potentially homeless people and families. "[A] tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required . . . [to] cure [homelessness]." 74 N.Y.2d at 112, 446 N.E. 2d at 1069, 544 N.Y.S. 2d at 552. The New York court contrasted the nexus between means and ends in other regulations sustained by the courts. In *Penn Central,* for example, "the Landmarks Law had the direct and immediate effect of saving a historic landmark, Grand Central Station." *Id.*

The Escondido Ordinance enriches those who happened to be residents at the time of enactment; but it does nothing for any subsequent residents compelled to pay large premiums for used mobilehome coaches; and it confers no benefit whatsoever on property owners.

B. The Escondido Ordinance effects a taking under the criteria of *Penn Central*.

In taking cases, this Court examines the factors identified in *Penn Central*, and weighs the public and private interests. The character and economic impact are clear from the allegations (which are essentially identical to those proved in *Azul Pacifico*): creation of leasehold interests in the owners' property, deprivation of rights of possession and disposition, including the right to exclude others, and a wealth transfer commensurate with the interests transferred. These effects frustrate reasonable, investment-backed expectations.

The Escondido Ordinance enriches residents in place at the time of the June 1988 election. New residents must pay large premiums to those in place. The park owners' incomes are reduced. Owners cannot adjust rents when residents move away and sell their mobilehomes, and their property rights are impaired, while the 1988 residents pocket windfalls. Since the value of any income property is a function of income, which declines in real terms (*i.e.*, adjusted for inflation) and cannot be adjusted when resales occur, mobilehome park values will decline. Plainly, reallocation of ownership rights between owners and tenants has substantial, adverse economic impact upon mobilehome park owners.

Amici do not of course contend that reductions in income or property value "take" property by themselves; but adverse economic impact is a relevant consideration,

especially in the absence of *any* benefit to property owners who bear the costs. In *Penn Central*, as in zoning cases, the Court has upheld regulations because they benefited all citizens in varying degrees, including those whose properties are directly burdened. All property owners benefit, for example, from zoning regulations that assure orderly development. The landmark preservation law at issue in *Penn Central* benefited all citizens, and permitted Penn Central to mitigate its effects by selling transferable development rights. 438 U.S. at 134-37.

The economic effects of the Escondido Ordinance differ fundamentally from the effects of zoning and other land use regulations that affect property values, since there is no "reciprocity of advantage". *Pennsylvania Coal*, 260 U.S. at 415. Here, the reduction in value represents a transfer of property rights from owners to tenants, rather than a decline in the value of the entire bundle of rights that originally belonged to the park owners. These facts were proved in *Azul Pacifico*, where the court found that resale premiums equalled "the capitalized value of both the use value (foregone rents) and the possessory interest (the right to exclude)," and correspondingly reduced the value of the mobilehome park. *Azul Pacifico*, slip. op. at 15213, 15232 and n.9.

The impact upon owners' investment-backed expectations is similar. Owners hope to operate their properties profitably, and later sell what they own to another investor, also for a profit. Investments may fare well or badly, depending upon market conditions, management skill and other factors, but investors in mobilehome parks are entitled to expect that they will retain essential rights to possess, use and dispose of their property, including lesser interests in the property. According to the allegations in the complaint, which must be accepted, the

Escondido Ordinance transfers valuable rights in the realty to the residents, who may sell those rights to possess and use the owners' land. This redistribution of property interests, and its economic consequences — a windfall to the 1988 residents which reduces or even forecloses any prospect for eventual capital gain — interferes with, even destroys, the expectations that led owners to invest in or develop mobilehome parks.

When mobilehome coaches change hands for tens of thousands of dollars more than comparable coaches without rent control, more than serendipity is at work. Buyers believe they get something for their money, and sellers who demand large premiums know that they are selling something valuable, a permanent bargain leasehold. Since the mobilehome is personal property that would command a far lower price if removed, what residents sell in addition to the home can only be an interest in the realty: a transferable leasehold interest, created by operation of law, that assures low rents and permanent tenure. Leasehold interests, like easements, air rights, mineral rights, and other interests in real property, are part of the complete bundle of rights that constitute the fee. Like all property, those interests enjoy constitutional protection, and can be taken only after payment of just compensation.

The appropriation of statutory leaseholds alleged in the complaint may be characterized as a "physical invasion," the extinguishment of fundamental attributes of ownership, an exaction from owners that advances no legitimate state purpose, or the appropriation of a leasehold. But whatever label or characterization is applied, the severe interference with constitutionally protected rights of possession, use and disposition constitutes a "taking" of property under decisions of this Court.

CONCLUSION

For these reasons, and those urged by Petitioners, the judgment of the California Court of Appeal should be reversed with instructions to remand these consolidated cases for trial.

Dated: November 27, 1991

Respectfully submitted,

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